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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY LE, Defendant and Appellant.	G051827 (Super. Ct. No. 13NF4429) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Thomas A. Glazier, Judge. Affirmed.

Andrea S. Bitar, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Le appeals from the trial court's postjudgment order denying his petition to have his felony second degree burglary conviction reduced to misdemeanor shoplifting under Proposition 47. (Pen. Code, § 1170.18.)[1] In addition, he requests to have the corresponding fines reduced. Le argues the trial court improperly interpreted section 459.5 to conclude his offense did not fall under the language of the shoplifting statute. We disagree and affirm the postjudgment order.

FACTS

Relevant to this case, Le was charged with, inter alia, second degree commercial burglary (§§ 459, 460, subd. (b)), two counts of identity theft (§ 530.5, subds. (a) & (c)(3)), and receiving stolen property (§ 496, subd. (a)). The felony complaint alleged Le "unlawfully enter[ed] La Quinta Motel, a commercial building, with the intent to commit larceny." The first count of identity theft alleged Le unlawfully obtained and used the credit card of one victim. The second count of identity theft related to Le's acquisition and possession of "the personal identifying information" of 10 "or more other persons." The receiving stolen property count alleged Le possessed a stolen "AMX card."

In his guilty plea, Le admitted he "willfully and unlawfully use[d] information of another with the unlawful[] purpose and without consent" and "retained personal information of 10 or more persons with the intent to defraud." The trial court sentenced him to two years in custody, with Le to serve one year in jail and one year under mandatory supervision.

Approximately one year later, Le filed a petition for resentencing to have his felony convictions for second degree commercial burglary (count 1) and receiving stolen property (count 4) reduced to misdemeanors under the newly enacted Proposition 47. At the hearing, the District Attorney stated, "[T]he People are opposed due to the fact

[1] All further statutory references are to the Penal Code.

[Le] used a motel room to conduct identity theft, computer activity, used that identity to acquire the room, and the People do not feel that that is under the new shoplifting statute." The trial court granted Le's petition as to count 4, but determined his second degree commercial burglary offense (count 1) did not qualify as misdemeanor shoplifting (§ 459.5).

DISCUSSION

Standard of Review

An analysis of a statute's meaning is a legal question reviewed de novo. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) When interpreting a voter initiative, "we apply the same principles that govern statutory construction. [Citation.]" (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) In doing so, "'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.]" (*Ibid.*) Second, the statutory language is "construed in the context of the statute as a whole and the overall statutory scheme. [Citation.]" (*Ibid.*) "When the language is ambiguous, 'we refer to other indicia of the voter's intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*Ibid.*) "'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) . . . .'" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.)

General Legal Principles of Proposition 47

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act (the Act), and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The Act reduced certain drug-related and theft-related offenses to misdemeanors for eligible defendants. (*Id.* at 1091.)

The Act enacted section 1170.18, which established procedures for persons currently serving a felony sentence who would have been guilty of a misdemeanor under the Act to petition for a recall of sentence and request resentencing in accordance with

sections 11350, 11357, 11377, of the Health and Safety Code or sections 459.5, 473, 476a, 490.2, 496, or 666, as those sections have been added or amended by the Act.

Relevant to Le's case, the Act added the new crimes of shoplifting (§ 459.5) and petty theft (§ 490.2). The shoplifting statute replaced the prior felony of second degree burglary where a defendant enters a commercial establishment with intent to commit *larceny* while that establishment is open during business hours, and when the value of the property taken or intended to be taken does not exceed $950. (§ 459.5.) Section 490a mandates the term *larceny* "shall hereafter be read and interpreted" to mean theft. Thus, under the Act, the conduct identified in the shoplifting statute requires the intent to commit petty theft. Entry into a commercial establishment with intent to commit any felony other than theft remains second degree burglary under section 459. (*People v. Chen* (2016) 245 Cal.App.4th 322, 327 (*Chen*).)

Similarly, the petty theft statute provides that any theft crime in which the value of the stolen money, labor, or real or personal property does not exceed $950 shall be punished as a misdemeanor. (§ 490.2.) Courts have construed the petty theft statute narrowly to exclude theft-related offenses not explicitly enumerated in section 490.2 or section 1170.18. (*People v. Bush* (2016) 245 Cal.App.4th 992, 1005 (*Bush*) [holding petty theft statute does not apply to theft from an elder]; *People v. Acosta* (2015) 242 Cal.App.4th 521, 526-527 [holding vehicle burglary does not fall under theft-related provisions of petty theft statute].)

Many Courts of Appeal have generated conflicting opinions about whether Proposition 47 applies to the theft or receipt of any kind of stolen property, including vehicles, where the value is less than $950. There are also conflicting appellate court opinions about whether the grand theft of an access card or bank account information should be reduced to misdemeanor petty theft. We are well aware these issues, and many others related to Proposition 47, are currently pending before the California Supreme Court. However, we found no authority, and the parties cite to none, regarding whether a

second degree commercial burglary conviction, where the defendant entered a hotel room to commit identity theft using a computer, can be treated as misdemeanor shoplifting.

Analysis

The trial court determined Le's second degree burglary offense did not qualify as misdemeanor shoplifting "given the nature of the activity and looking at the fact that it's a motel room and he's going in to conduct an identity theft, and using the victim's I.D. in acquiring the room." As we explain below, on this record we agree with the trial court.

We find instructive *Chen, supra*, 245 Cal.App.4th 322. In that case, defendant was charged with second degree burglary and perjury in the application for a driver's license. The complaint alleged defendant, "entered the Department of Motor Vehicles, 'a commercial building,' with the intent 'to commit larceny and any felony." (*Id.* at p. 324.) Defendant pled nolo contendere to the burglary count, and after passage of Proposition 47, he sought to be resentenced on the charge as a misdemeanor because "'the amount in question was not more than $950.'" (*Id.* at p. 325.)

The court in *Chen* recognized section 459 at the time of defendant's burglary conduct provided the offense of second degree burglary was a wobbler, chargeable as either a felony or as a misdemeanor. (*Chen, supra*, 245 Cal.App.4th at p. 326.) It reasoned, "Proposition 47 made no changes to sections 459, 460 or 461, nor did it explicitly reduce all prior felony second degree burglary offenses to misdemeanor second degree burglary offenses. In relation to [defendant's] case, Proposition 47 enacted new section 459.5, which . . . defines the new misdemeanor offense of 'shoplifting' where, formerly, second degree burglary could have been charged." (*Ibid.*)

"Proposition 47, by amending the language of certain statutes that previously defined felony offenses, explicitly reduced a number of specified offenses from felonies to misdemeanors. It added new misdemeanor offenses to the Penal Code. The offenses amended or added by Proposition 47 are sections 459.5, 473, 476a, 490.2,

496, and 666, and Health and Safety Code sections 11350, 11357, and 11377. The offense of burglary as defined in section 459 is not one of the reduced offenses included in the text of Proposition 47, except to the extent that new section 459.5—the misdemeanor crime of shoplifting—now applies." (*Chen, supra*, 245 Cal.App.4th at p. 326.) The *Chen* court explained that given the allegations set forth in the criminal complaint regarding the perjury charge, "the 'larceny' language" in the burglary charge "plainly was superfluous, and reflected nothing more than the verbatim use of the statutory language from the burglary statute. (See § 459.)" (*Chen, supra*, 245 Cal.App.4th at p. 327.)

The court determined, "There simply was no larceny, that is, no theft of any kind, involved in [defendant's] case. [Defendant] was not convicted of a felony offense that is now reduced to a misdemeanor offense under Proposition 47. The offense of burglary, when charged as a felony under section 459, remains a felony offense following the passage of Proposition 47 unless the defendant's criminal conduct involved a theft from a commercial establishment, and the theft involved less than $950, in which case the offense is now shoplifting under section 459.5. An existing felony burglary conviction not involving a theft of less than $950 is unaffected by Proposition 47. The record before us . . . establishes without any room for doubt—regardless of which side had the burden of proof in the trial court on the question of [defendant's] eligibility for Proposition 47 relief—that [defendant] did not commit the offense of misdemeanor shoplifting. He was convicted of felony second degree burglary based on the entry into a building with the intent to commit the felony of perjury. This is established by the pleadings and record of conviction. [Defendant] was not convicted of a felony offense that is now reduced to a misdemeanor offense under Proposition 47. As a result, he is not eligible for Proposition 47 relief, and his petition should have been denied." (*Chen, supra*, 245 Cal.App.4th at p. 327.)

Le's misconduct is not an act identified in the shoplifting statute. Identity theft, unlike other petty thefts, is committed when a person obtains personal identification of another and "uses that information for *any unlawful purpose*." (§ 530.5, subd. (a), italics added; *People v. Barba* (2012) 211 Cal.App.4th 214, 223.)[2] The term "unlawful purpose" is broad and includes everything from illegally obtaining services to misusing medical information. (*Ibid.*) Consequently, Le's entry into the hotel room to obtain and use personal information for "any unlawful purpose" is not merely another form of theft. The crime can be committed without an actual taking, as opposed to the crimes of petty theft, robbery, and carjacking. For this reason, Le's comparison of his offense to other minor theft offenses fails. (See *Acosta, supra*, 242 Cal.App.4th at p. 526 ["[B]urglary of a motor vehicle is [not] merely another form of theft, as theft is not an element of the offense"].)

Moreover, as aptly explained in *People v. Valenzuela* (2012) 205 Cal.App.4th 800, 808, "[The] legislative history makes clear, the retention of personal identifying information of another is *not a possession crime, but is a unique theft crime*." (Italics added.) The Legislators recognized the damage caused in the lives of the victims of identity theft potentially went beyond any actual property obtained. "'[T]the crimes of identity theft, and complementary statutory provisions, were created because the harm suffered by identity theft victims went well beyond the actual property obtained through the misuse of the person's identity. Identity theft victims' lives are often severely disrupted. For example, where a thief used the victim's identity to buy a coat on credit, the victim may not be liable for the actual cost of the coat. However, if the victim was initially unaware of the illicit transaction, the damage to the person's credit

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[2] Section 530.5, subdivision (a), states in pertinent part: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of [s]ection 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense . . . ."

may be very difficult to repair. The perpetrator could commit other crimes by using the victim's identity, causing great harm to the victim. Thus, identity theft in the electronic age is an essentially unique crime, not simply a form of grand theft. [¶] In contrast, grand theft is relatively well defined. . . . Grand theft is typically a discrete event, not a crime that creates ripples of harm to the victim that flow from the initial misappropriation.' [Citation.]" (*Ibid.*)

We found nothing in Proposition 47 to support Le's theory his crime, entering a hotel room to steal the identities of other people, was intended to be treated as shoplifting or be re-designated as a misdemeanor. Le argues the purpose of Proposition 47 was to reduce the prison population by focusing "scarce resources of serious and violent crime, rather than minor theft and drug possession offenses." But we consider identity theft to be a serious crime because of its long lasting, detrimental effects on the victims. It can create non-financial havoc in addition to significant monetary loss. As mentioned earlier, the Legislature did not intend all forms of theft to be covered under the Act, and left untouched more serious crimes calling for harsher treatment. (See *Acosta, supra,* 242 Cal.App.4th at p. 526 [vehicle burglary should be treated more harshly because entry must be made into a locked vehicle]; *Bush, supra,* 245 Cal.App.4th at pp. 1004-1005 [theft from an elder more serious than petty theft because offenders "prey on vulnerable elders and dependent adults"].) We conclude the trial court correctly determined Le's offense was not an act identified in the shoplifting statute, i.e., entry with the intent to commit petty theft.

Here, the prosecution opposed the petition based on its assertion the basis of the larceny in the burglary was identity theft. Persuaded by the prosecution's assertion, the trial court denied Proposition 47 relief on that basis. The record does not contain any information regarding the specifics of the larceny alleged in the burglary count other than the prosecution's assertion. If the larceny that formed the basis of the burglary was simply the theft of the hotel room and that value was established not to

exceed $950, petitioner could argue he is entitled to relief on that basis. If the larceny was identity theft as found by the court, we agree such a crime is not eligible for Proposition 47 relief.

In *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*), the trial court denied a petition pursuant to Proposition 47 seeking resentencing on multiple convictions for the offense of commercial burglary in violation of section 459. Division One of the Fourth District Court of Appeal affirmed, holding that a Proposition 47 petitioner bears the burden of proof to establish he or she is eligible for resentencing by showing that the value of property involved in an offense did not exceed $950, and finding the petition at issue gave "virtually no information regarding [the petitioner's] eligibility for resentencing." (*Id*. at p. 880.) The court affirmed "without prejudice to subsequent consideration of a properly filed petition." (*Id*. at p. 881.)

We find *Sherow* provides sound guidance. Accordingly, we affirm the trial court's decision to deny Le's Proposition 47 petition. Le failed to meet his burden of establishing he was entitled to proposition 47 relief.

DISPOSITION

The order denying Le's Proposition 47 petition for resentencing is affirmed without prejudice to file a petition properly supported by a showing he is eligible for resentencing in accord with the Act.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.